Supreme Court, U.S.
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No. 04 256

IN THE

Supreme Court of the United States

FELIX ILKECHUKWU ASIKA,
Petitioner,

v.

JOHN ASHCROFT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government may use an immigration removal proceeding to rescind an alien's lawful permanent resident status eight years after his adjustment of status where the statutory provision authorizing rescission requires that such action be taken "within five years after" the adjustment of status.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Felix Ilkechukwu Asika respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*., 1a-13a) is reported at 362 F.3d 264. The order of the Board of Immigration Appeals (App., *infra*., 14a-15a) and the Immigration Judge's decision (App., *infra*., 16a-26a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 2004. A petition for rehearing *en banc* was denied on May 24, 2004. This Petition for a Writ of Certiorari is timely, as it is being filed within ninety days of the Court of

Appeals' ruling on the rehearing petition. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1256(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*[1] provides, in pertinent part:

> If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title or any other provision of law it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to the commencement of procedures to remove the alien under section 1229a of this title [removal proceedings], and an order of removal issued by an immigration judge shall be sufficient to rescind an alien's status.

2. An additional relevant portion of the INA is reproduced at App., *infra.*, 28a.

STATEMENT

This Petition arises from a decision of the United States Court of Appeals for the Fourth Circuit permitting the Bureau of Immigration and Customs Enforcement (BICE), formerly a part of the Immigration and Naturalization Service (INS) and now a part of the Department of Homeland Security, to use removal proceedings to rescind an alien's lawful permanent resident status more than *eight* years after the alien's adjust-

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[1] All references to Title 8 of the United States Code are to the 1994 edition, Supplement V, unless otherwise indicated.

ment of status, even though the statute authorizing rescission plainly requires rescission to be effected within *five* years of adjustment of status, and also clearly provides that a removal order constitutes a rescission. The Fourth Circuit improperly characterizes its rationale as one of deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* prescribes deference, however, only where the relevant statute is silent or ambiguous regarding its application. *Id.* at 842-43 ("If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). There is no such silence or ambiguity here. On the contrary, the statute unequivocally provides (i) that a rescission must be effected within five years after an adjustment of status, and (ii) a removal order entered against a lawful permanent resident for improper adjustment of status constitutes a rescission. It is undisputed that the INS initiated the removal proceeding in this case more than eight years after Petitioner's adjustment of status. The proceeding was therefore untimely. The Court of Appeals' reading of the relevant statute renders it a virtual nullity, allowing the agency to do precisely what is prohibited under the five-year bar by simply repackaging its action as a removal proceeding.

By affirming BICE's decision, the Fourth Circuit's ruling erodes a critical statutory protection for lawful permanent residents, while creating an unnecessary split among the circuits. The resulting circuit split precludes the consistent resolution of this issue in the absence of a final determination by this Court. The Fourth Circuit has thus (i) "entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter"; and (ii) "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(a), (c).

* * * *

1. Petitioner Felix Ilkechukwu Asika is a 47-year-old native of Nigeria. C.A.R. 006, 066.[2] He was admitted into the United States on April 14, 1979 on a student (F-1) visa and began studying at Cook County College, later transferring to Texas Southern University, where he received a Bachelor of Arts degree in 1982. C.A.R. 038, 041. Petitioner has never been arrested or convicted of any crime, has never been a recipient of welfare or public support, and has always paid his taxes. C.A.R. 128, 226.

2. Petitioner married Paula Aliniece, a United States citizen, on May 27, 1981. C.A.R. 058, 312. Ms. Aliniece filed an Immediate Relative Visa Petition (Form I-130) on June 5, 1981, and Petitioner filed an accompanying Application for Adjustment of Status to Permanent Resident (Form I-485). C.A.R. 056, 066. INS issued a memorandum in which the immigration officer recommended an "IR6" immediate relative admission, but INS did not complete the processing of the application at that time. C.A.R. 069. Mr. Asika remained with his wife for about two years before they separated. C.A.R. 223.

3. Having received no response from INS on his first adjustment application, Petitioner applied for temporary resident status (Form I-687) on June 16, 1987 under the Legalization or "Amnesty" program enacted by Congress in 1986. C.A.R. 071-74. The Legalization program offered amnesty to aliens who entered the United States before January 1, 1982 and whose authorized stay ended before that date, or whose unlawful status was known to the government as of that date. *See* 8 U.S.C. § 1255a (1988 ed.). Petitioner was qualified to apply under the program. His unlawful status, which made him eligible to become a temporary resident under the

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[2] The joint appendix filed with the Court of Appeals reproducing the Certified Administrative Record is cited herein as "C.A.R. ___".

Legalization program, stemmed from off-campus employment he engaged in while admitted under the student visa.[3] Petitioner worked for the Texas Southern University payroll department in 1980, for Riley's Data Share International from 1980 to 1981, and for Quality Security Service from 1981 to 1986. The Social Security Administration had records of this employment. C.A.R. 050. The INS examiner recommended that Petitioner's application for Legalization be granted but requested further documentation of the off-campus employment. C.A.R. 076-77. Petitioner's counsel failed to submit the requested documentation, and the application was denied on January 21, 1988. C.A.R. 300-01. Petitioner's counsel filed an administrative appeal of this decision on February 17, 1988. C.A.R. 302.

4. While the appeal was pending, Petitioner's counsel filed an application on June 22, 1989 to adjust Petitioner's status from temporary resident to permanent resident (Form I-698). C.A.R. 008, 306. Although Petitioner had not received the temporary residence status that was required for the permanent residence application, INS granted the adjustment of status and created a Memorandum of Creation of Record of Lawful Permanent Residence on July 25, 1989, thus making Petitioner a lawful permanent resident. C.A.R. 112. INS issued a Resident Alien card ("green card") to Petitioner, showing an "administrative adjustment date" of July 24, 1989 and a date of adjustment to temporary residence of June 16, 1987. C.A.R. 114.

5. Four years later, on March 18, 1993, the Petitioner's administrative appeal of the Legalization denial was denied by the Legalization Appeals Unit (LAU). Petitioner's counsel had again failed to supply the appropriate documentation

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[3] Off-campus employment is considered to violate a student visa and thus places the alien in unlawful status. Unlawful status is a requirement for relief under the Legalization statute.

of Petitioner's off-campus employment. Although it denied temporary resident status, INS did not take action at that time to rescind Petitioner's permanent residence pursuant to 8 U.S.C. § 1256(a). Internal INS communications obtained through the Freedom of Information Act reveal confusion regarding Petitioner's status.[4]

6. INS took no action toward rescission at that time, and the five-year deadline passed in July 1994. Because INS took no action, Petitioner had no indication that there was any question regarding his immigration status. As far as he knew, his previous counsel had successfully obtained lawful permanent resident status for him. C.A.R. 124, 133, 303-05. He was, after all, plainly eligible for such adjustment under the Legalization program, having resided here continuously since 1979 and having worked off campus while admitted on a student visa. With the passage of five years after the date of his adjustment of status, Petitioner was also eligible to apply for naturalization. On September 21, 1995, Petitioner took what he believed would be the final step toward becoming an American. He applied for U.S. citizenship. C.A.R. 126-29.

7. Petitioner's naturalization application apparently prompted another look at his prior immigration processing, and INS at this point took the view that Petitioner had been

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[4] A memorandum from the Eastern Service Center to the Washington District dated May 4, 1993 states that the adjustment of status was in error and indicates that the file was being forwarded for consideration of rescission. C.A.R. 120. A second copy of the memorandum includes a handwritten notation that reads as follows: "Subject was granted LPR [lawful permanent resident] status as an IR-6. Therefore, there is no basis for revocation." C.A.R. 122. A third copy of the memorandum includes a fuller handwritten comment by the same district official: "This memo is clearly in error. The applicant did not adjust under section 245A. Rather, he adjusted as an IR-6 under section 245 of the Act. Therefore, recision [sic] of LPR status is not warranted." C.A.R. 124. In fact, the district official was mistaken; Petitioner's status was adjusted under section 245A (Legalization), not as an IR6 immediate relative. C.A.R. 112.

ineligible for permanent residence at the time he adjusted his status. Agency officials also understood, however, that the five-year period for rescission had passed and that no action to rescind Petitioner's lawful permanent resident status could be taken at that point. A memorandum by District Adjudications Officer (DAO) K.M. Ratke to the file dated June 24, 1996 noted the error made by the Washington District, but acknowledged that "[t]he status can no longer be rescinded as more than five years has passed since the date of adjustment." C.A.R. 133.

8. Rather than ending the matter there, however, DAO Ratke devised a scheme for circumventing the five-year bar.[5] INS would dust off the long-dormant application for adjustment based on Petitioner's marriage to Ms. Aliniece. The agency would then process and deny it, thus providing a basis (in INS's view) for denial of naturalization. The case would then be referred to the Immigration Court for deportation proceedings based on a charge that Petitioner was ineligible for permanent residence at the time of his adjustment of status under the Legalization program.

9. In accordance with this plan, INS sent a letter to Paula Aliniece on June 27, 1996. C.A.R. 135, 223. Mailed to a 15-year-old address, this letter "notified" her of the agency's intent to deny the visa petition she had filed in 1981 on behalf of her now-estranged husband, with whom she was no longer in contact. Not surprisingly, there was no response to this letter or to a second letter sent on April 15, 1997 informing Ms. Aliniece that the visa petition would be denied based on her "failure" to respond. C.A.R. 137-38.

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[5] DAO Ratke's memorandum described her plan: "[T]he I-130 and I-485 are technically still pending. The I-130 and I-485 shall be denied by sending the petitioner the notices of denial in Texas at the last address of record. Once the I-485 is denied, case shall be referred to INV for issuance of OSC based on his failure to establish eligibility under section 245A." C.A.R. 133.

10. On May 14, 1997, Petitioner's Application for Naturalization was denied. INS's letter acknowledged that "[y]our status as a legal permanent resident can no longer be rescinded as more than five years has passed since the date of adjustment," but stated that naturalization would be denied based on the recent denial of Petitioner's adjustment through the marriage to Ms. Aliniece. C.A.R. 149-51.

11. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Div. C, § 308, Pub. L. 104-208, 110 Stat. 3009-546, was enacted on September 30, 1996. Among other things, IIRIRA consolidated exclusion and deportation proceedings into a new "removal" proceeding. The same provisions also amended the section containing the five-year limitation period for rescission to clarify that "an order of removal issued by an immigration judge shall be sufficient to rescind an alien's status." 8 U.S.C. § 1256(a). The removal provisions of IIRIRA became effective for cases commenced in the immigration court system through a Notice to Appear (Form I-862) filed on or after April 1, 1997.

12. On August 19, 1997, more than eight years after Petitioner's adjustment of status, INS issued a Notice to Appear and filed it with the Immigration Court shortly thereafter, thus initiating the removal proceedings that give rise to this Petition. C.A.R. 155.

13. A removal hearing was held on November 26, 1997. Petitioner argued before the Immigration Judge (IJ) that a removal proceeding could not be employed to rescind his lawful permanent resident status, because the statute providing authority for rescission requires such action to be taken "within five years after" the adjustment, and more than eight years had passed between the time of the adjustment and the commencement of the removal proceedings. The IJ rejected this argument and issued an order on June 23, 1998 permitting voluntary departure from the United States with-

in 30 days and providing in the alternative for Petitioner's removal. C.A.R. 197-204.

14. The IJ based his decision on an earlier administrative interpretation that he believed was binding on him in the absence of contrary Fourth Circuit authority. The authority he relied on holds that *exclusion* and *deportation* proceedings do not constitute rescission, *see Matter of Belenzo*, 17 I. & N. Dec. 374, 383 (A.G. 1981) (deportation); *Matter of S-*, 9 I. & N. Dec. 548, 553-54 (A.G. 1962) (exclusion), but the IJ made no apparent effort to reconcile the rationale of these cases (*i.e.*, that deportation and exclusion do not constitute rescission) with IIRIRA's new removal provisions, *e.g.*, IIRIRA § 308 (providing that removal order constitutes rescission).

15. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (BIA), which had jurisdiction pursuant to 8 C.F.R. § 3.1 (2002). The BIA affirmed the IJ's ruling on February 26, 2003. It is not clear what reasoning the Board relied on in affirming the IJ because a single Board member simply issued a statement under the Board's new "streamlining" procedures that the Board affirms the result below without opinion. C.A.R. 002.

16. Petitioner appealed the BIA's decision to the United States Court of Appeals for the Fourth Circuit, pursuant to 8 U.S.C. § 1252. The Court of Appeals affirmed the BIA's decision on March 29, 2004. In its opinion, the Court of Appeals characterized the statutory time bar on rescission as "ambiguous" in relation to removal proceedings and therefore applied "*Chevron* deference" to the agency's construction of the statute. *See Asika v. Ashcroft*, 362 F.3d 264, 265 (4th Cir. 2004). The Court of Appeals stated that section 1256(a) "does not speak to the interplay between the Attorney General's authority to rescind an adjustment of status and his authority to deport, and provides no express guidance whatsoever on the more narrow question of whether the five-year

limitation on rescission actions must also apply to deportation actions, in those cases where the same grounds that justify deportation would also support rescission of status." *Id.* at 269. The court noted Petitioner's argument that if a rescission must be effected within five years of adjustment and a removal order constitutes a rescission, the removal order must be issued within five years of adjustment. Acknowledging that this argument has "some force," the court nevertheless rejected it on the basis that this interpretation is not the "*only*" one that could be given to the provision. *Id.* at 270 (emphasis in original). Rather, the court reasoned, Congress could have intended the five-year limitation to apply only to those rescissions not effected through a removal proceeding. *Id.* According to the court, the five-year limitation would play an "important, if limited, role, even under the Attorney General's construction of the Act." *Id.* The limitation would ensure that after five years the Attorney General could resort only to deportation, whose procedural formality is embodied in statutory provisions, as opposed to administrative regulations.[6] Because section 1256(a) by its language makes the five-year bar applicable only to aliens who adjust status in the United States, and not to aliens who initially enter the country as permanent residents, the court further reasoned that its much narrower reading of the five-year bar would reduce "disparate treatment" as between adjusted and admitted lawful permanent residents. *Id.* at 271. Having found the statute ambiguous as to whether a rescission effected through a removal order must be obtained within five years of adjustment, the court proceeded to find the Attorney General's interpretation permissible under *Chevron* for the same reasons it adduced in finding "ambiguity." *Id.* at 270-71.

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[6] The Court of Appeals acknowledged Petitioner's argument that "this statutory difference in procedural protections should not figure in our analysis because, in practice, INS conducts rescission and deportation proceedings in an almost identical fashion." *Id.* at 270 n.7.

18. The Court of Appeals denied Petitioner's request for rehearing en banc on May 24, 2004; this Petition follows.

19. At the age of 47, Mr. Asika now faces the prospect of being expelled from the country he has lived in for nearly a quarter century. Petitioner has been gainfully employed, working at Bank of America (formerly NationsBank) since 1988. He has committed no crimes, has always paid his taxes, and owns a home in Maryland. C.A.R. 144, 220, 226. Despite his hard work and strong ties to the community, Petitioner now stands to lose all that he has worked for in this country.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision conflicts with the plain language of 8 U.S.C. § 1256(a), eviscerates the protective purpose of the five-year limitation, and creates an unnecessary split among the circuits. As noted above, IIRIRA amended the rescission provision, 8 U.S.C. § 1256(a), to clarify that a removal order issued by an immigration judge suffices to rescind lawful permanent resident status. The previous sentence of the same subsection requires any rescission to be effected within five years of the adjustment of status. The inexorable inference from these two provisions is that *all* rescissions, including those obtained through removal orders, must be effected within the five-year statutory period. Yet, the Fourth Circuit declined to recognize this straightforward statutory command. By its decision the Court of Appeals has (i) "entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter"; and (ii) "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10.

1. The statutory language is clear, providing a five-year limitation for rescission, irrespective of the procedural mechanism used to obtain it:

> If, at any time *within five years after* the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title or any other provision of law it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to the commencement of procedures to remove the alien under section 1229a of this title [removal proceedings], and *an order of removal issued by an immigration judge shall be sufficient to rescind an alien's status.*[7]

8 U.S.C. § 1256(a) (emphasis added).[8] It is undisputed that the rescission in this case did not occur "within five years"

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[7] "Removal" is a term of art under IIRIRA, which phased out "exclusion" and "deportation" proceedings in favor of a consolidated "removal proceeding." *See* 8 U.S.C. § 1229a ("Removal Proceeding"); H.R. Conf. Rep. 104-828, 211. Removal proceedings are those commenced on or after April 1, 1997 under the removal provisions of the INA, which became effective on that date. *See* IIRIRA § 309(c)(1); *Reno v. American-Arab Anti-Discrim. Comm.*, 525 U.S. 471 (1999). Respondent's proceeding was commenced on August 19, 1997 under § 1229a and is therefore a removal proceeding.

[8] "Both Asika and the Attorney General agree, with uniform support from the case law, that section [1256(a)] establishes a five-year limitation on the Attorney General's power to rescind erroneously granted adjustments of status." *Asika*, 362 F.3d at 268 (4th Cir. 2004); *see also Bamidele v. INS*, 99 F.3d 557, 563 (3d Cir. 1996); *Fulgencio v. INS*, 573 F.2d 596, 598 (9th Cir. 1978); *Quintana v. Holland*, 255 F.2d 161, 164

after Petitioner's adjustment of status. The government is therefore in open contravention of the plain language of the statute, and the Court of Appeals has wrongly affirmed its untimely action under the aegis of "deference."[9]

2a. The Fourth Circuit's decision creates an unnecessary circuit split, providing conflicting guidance to lower courts and ensuring disparate dispositions of similar cases. By permitting the government to employ removal proceedings as a means to rescind lawful permanent resident status in violation of the five-year limitation, the Fourth Circuit has set itself in opposition to the Third Circuit, which flatly rejected this position in *Bamidele*, 99 F.3d at 557, even before IIRIRA's amendment clarifying that removal orders are rescissions became effective. In *Bamidele*, the court nullified deportation proceedings commenced after the five-year limitation period, stating that to accept INS's position would "in practical effect" construe the statute of limitation "out of existence" by offering "virtually no protection from untimely action by the INS." *Id.* at 564-65. The court added that "[i]t defies logic to say that facts known to the INS within five years of Bamidele's adjustment of status *and* which would form the basis of a rescission action (had INS taken timely action) should also empower the INS to deport Bamidele."[10]

(3d Cir. 1958); *Matter of Quan*, 12 I. & N. Dec. 487 (BIA 1967); *Matter of Belenzo*, 17 I. & N. Dec. 374, 380 (A.G. 1981); *Matter of S-*, 9 I. & N. Dec. 548, 554 (A.G. 1962).

[9] Arguably, based on the language of the statute, the removal order has to be *issued* within five years of adjustment, but some courts have held it is sufficient that the proceeding *begin* within the five-year limitation period. *See, e.g., Zaoutis v. Kiley*, 558 F.2d 1096, 1099 (2d Cir. 1977). The Court need not address this issue, as Petitioner's removal proceeding commenced more than eight years after his adjustment of status.

[10] As the Fourth Circuit noted, the Attorney General himself has "conceded that his 'construction of the time limitation in section 246 may be of little practical value to the alien.'" *Asika*, 362 F.3d at 269 (quoting *S-*, 9 I. & N. at 555).

Id. at 564 (emphasis in original). The Third Circuit's logic applies *a fortiori* to removal proceedings in view of IIRIRA's amendment. The Fourth Circuit has thus created an unnecessary circuit split.

2b. By contrast, the Court of Appeals would not have created a circuit split by ruling for Petitioner. The Ninth Circuit appears to be the only Court of Appeals that upheld the Attorney General's position that exclusion and deportation proceedings do not constitute rescissions, and all of its relevant decisions are pre-IIRIRA and hence distinguishable. *See Biggs v. INS*, 55 F.3d 1398, 1401 (9th Cir. 1995) (dictum); *Choe v. INS*, 11 F.3d 925 (9th Cir. 1993) (dictum); *Monet v. INS*, 791 F.2d 752 (9th Cir. 1986); *Oloteo v. INS*, 643 F.2d 679 (9th Cir. 1981) (non-adjusted alien); *cf. Ubiera v. Bell*, 463 F. Supp. 181 (S.D.N.Y. 1978) (non-adjusted alien; decided on ripeness and equal protection grounds). These cases, addressing only *exclusion* and *deportation* orders, are superseded by IIRIRA's amendment clarifying as a matter of law that *removal* orders constitute rescissions. The IIRIRA amendment thus confirms the position taken by the Third Circuit in *Bamidele* before enactment of the fortifying language.

2c. The circuit split is reflected in a recent district court decision. In *Sanchez v. Winfrey*, 2004 U.S. Dist. LEXIS 8907 (W.D. Tex. April 28, 2004), an alien brought a *habeas corpus* petition challenging the deportation proceeding rescinding his permanent resident status as untimely on account of the five-year limitation on rescission. The court noted the disagreement between the Third and Fourth Circuits, and granted the alien bond, finding that, in the absence of controlling Fifth Circuit authority, his petition presented a "substantial claim." *Id.* at 9.

3a. The purpose of the five-year limitation on rescission is both straightforward and important. It provides a measure of finality and repose for persons who have obtained and held

lawful permanent resident status for five years. Lawful permanent resident status is the highest legal status that can be obtained by an alien in the United States and the penultimate step on the road to naturalized citizenship:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Johnson v. Eisentragger, 339 U.S. 763, 770-71 (1950); *see also Rasul v. Bush*, 159 L. Ed. 2d 548, 564 (2004) (Kennedy, J., concurring, noting "ascending scale of rights" with increased connection to United States); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."). This Court has therefore required the highest measure of due process for procedures that may result in the loss of lawful permanent resident status. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("Plasencia's interest here is, without question, a weighty one. She stands to lose the right 'to stay and live and work in this land of freedom.'") (holding that returning permanent residents, unlike other applicants for admission to the country, have a right to due process under the Fifth Amendment in exclusion proceedings) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945)); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).[11]

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[11] Similarly, Congress has provided forms of relief from deportation to lawful permanent resident aliens that are not enjoyed by other aliens. *See, e.g.*, 8 U.S.C. § 1229b(a) (waiver of certain criminal convictions).

Hence, "'[a]liens who obtain adjusted status have a legitimate expectation that their immigration will be permanent.'" *Bamidele*, 99 F.3d at 564 (quoting *Choe v. INS*, 11 F.3d 925, 930 (9th Cir. 1993)).

3b. As lawful permanent resident status is a durable and important status, its rescission is a serious and weighty matter. As the Third Circuit wrote shortly after the enactment of the INA:

> That which is accomplished by a rescission of status is pretty harsh. It is comparable to the revocation of citizenship about which the courts have been very keen to make sure that the individual received careful protection. The rescission blocks the man on the road to citizenship, and results in banishment from a country where he may have lived a long time, as in this case. We think, therefore, that Congress meant to require the Attorney General to take the described action within five years and to be bound by that limitation itself.

Quintana v. Holland, 255 F.2d 161, 165 (3d Cir. 1958). The BIA itself has acknowledged that the five-year limitation in § 1256(a) is intended to benefit the alien and should therefore be construed in the alien's favor: "We recognize the respondent's argument that the five-year limitation in section [1256] is remedial in nature, as its purpose is to grant an alien relief from the harsh results of rescission of status and, thus, any doubt or ambiguity is to be interpreted and resolved in a manner favorable to the alien." *Matter of Carrillo-Gutierrez*, 16 I. & N. Dec. 429, 430 (BIA 1977); *see also Scott v. INS*, 385 U.S. 214, 225 (1966) (applying rule of lenity because "deportation is a drastic measure and at times the equivalent of banishment or exile"); *Costello v. INS*, 376 U.S. 120, 128 (1964) (same).

3c. The five-year limitation in § 1256(a) contemplates that adjustments of status more than five years old, even if improperly granted, will be beyond the reach of BICE—

indeed, that is the provision's *raison d'etre*. In this respect, the five-year limitation is no different from many other statutes of limitation, which by their nature restrict the enforcement powers of the Executive, and commonly require that serious crimes go unpunished and other important interests unvindicated. There is no question of a crime here; at most, BICE has raised procedural defects in an adjustment of status.[12] Moreover, the rationale of the statute of limitation provision is apparent here, where Petitioner had no idea for almost nine years of the defect in his status, purchased a home in the United States, held a job, paid taxes, and otherwise became a productive member of his community before learning of any question regarding his status. Petitioner is now 47 years old and has lived in the United States for twenty-five years. Section 1256(a) is specifically designed to provide repose to persons in his situation.

4a. The *Asika* court's decision is plainly wrong on the merits. The court's basic error was to characterize a clear statutory requirement as "ambiguous" under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The question the court faced was whether the five-year limitation period applies to rescissions effected through removal orders. As a matter of syllogistic logic, if (i) all rescissions must be undertaken within five years, *see* § 1256(a), and (ii) all removal orders for improper adjustment of status are rescissions, *see id.*, then (iii) all removal orders for improper adjustment of status must be undertaken within five years (or, at a minimum, the removal proceeding must be commenced within that period). The court proceeds to find this clear statutory mandate "ambiguous," but its analysis

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[12] As noted, Petitioner was qualified to apply under the Legalization program due to his off-campus employment during the term of his student visa, but failed to carry his burden of proof because his lawyer did not submit documentation of the off-campus employment as requested. *See* discussion, *supra*, Statement ¶ 3.

finding ambiguity is without merit. The court states that "section [1256(a)]'s five-year limitation on rescission actions plays an important, if limited role, even in the Attorney General's construction of the Act." *Asika*, 362 F.3d at 270. This "limited role," according to the court, is to provide added protection for aliens subjected to rescission proceedings, whose procedures are codified in administrative regulations rather than statutory provisions. *See id.* But whether the provision might be viewed as serving some "purpose" under the Attorney General's construction is not the issue. The issue is whether the two sentences of § 1256(a) taken together leave any genuine ambiguity as to whether a removal proceeding for improper adjustment of status must be undertaken within five years of the adjustment. If the statutory language is clear, it does not matter that a "purpose" could be imagined for the provision under a contrary interpretation. *See Chevron*, 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter.").

4b. The Court of Appeals also erred in deferring to the BIA on a purely legal question beyond the agency's expertise. *Chevron* deference to agency construction is inappropriate where, as here, the subject matter of the interpretation lies within the expertise of the judiciary rather than the agency. In recent years, the Court has treated expertise as a precondition for extending deference to agency construction of statutes. *See United States v. Mead Corp.*, 533 U.S. 218 (2001) (limiting *Chevron* deference to situations where legislature has authorized agency to engage in statutory interpretation and agency followed proper procedures in arriving at decision). Deference is not automatic, but predicated on an investigation into the "specialized experience" of the agency and "subtle questions" under review. *Mead*, 533 U.S. at 235. In keeping with these principles (albeit prior to the *Mead* decision), the Third Circuit declined to defer to INS's interpretation of section 1256(a), observing that "[a] statute of limitations is not a matter within the particular expertise of

the INS. Rather we consider this 'a clearly legal issue that courts are better equipped to handle.'" *Bamidele*, 99 F.3d at 561 (quoting *Dion v. Sec'y of Health and Human Servs.*, 823 F.2d 669, 673 (1st Cir. 1987)). Statutes of limitation and the policies underlying them are matters squarely within the competence of the judiciary, not the BIA.

4c. The Court of Appeals relied on interpretive arguments first adduced in *Matter of S-*, 9 I. & N. Dec. 548, 553-54 (A.G. 1962).[13] The Attorney General in *Matter of S-*, overruled the BIA and an immigration judge, holding that a returning permanent resident alien could be placed in exclusion proceedings, notwithstanding the 5-year limitation in § 1256(a), where the adjustment of status had occurred more than five years before. The Attorney General averred (i) that "[n]either the exclusion provisions of the Act . . . nor its deportation provisions . . . contain statutes of limitations"; (ii) that deportation and exclusion are different from rescission in that they result immediately in an order enforceable through physical removal; (iii) that rescission procedures, left largely to regulations, could theoretically have been drafted with less due process protection than the statutory exclusion and deportation procedures, thus requiring the added protection of a statute of limitation; and (iv) that applying the five-year bar to exclusion and deportation proceedings would result in disparate treatment of permanent residents who obtained their status by adjustment of status in the United States as opposed to admission at the border.

4d. These arguments are all interpretive, supporting the conclusion that exclusion and deportation proceedings do not constitute rescission. Hence, they have no application post-

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[13] The Attorney General extended the *Matter of S-* holding to deportation proceedings in *Matter of Belenzo*, 17 I. & N. Dec. 374, 383 (A.G. 1981), relying on the same rationales and again overruling the immigration judge and BIA.

IIRIRA where it has been made clear by statute that a removal order against a lawful permanent resident for improper adjustment constitutes a rescission of that status. In light of IIRIRA's amendment, the *Matter of S-* arguments therefore need not even be reached. *See Chevron*, 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter.").[14]

4e. The *Matter of S-* arguments adopted by the Court of Appeals are also substantively flawed. The first proposition, that exclusion and deportation proceedings lack general statutes of limitation, is true but inconsequential. The rescission statute of limitation may still apply either within such proceedings or to foreclose them, particularly where, as here, the proceeding is founded on precisely the same subject matter as a rescission proceeding would have been if timely brought and revokes lawful permanent resident status. Moreover, it makes perfect sense that Congress would place the statute of limitation, which is applicable to a narrow class of aliens with special status, in a provision relating to revocation of that status and not in a provision dealing with deportability generally.

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[14] *Matter of S-* and its sister case *Matter of Belenzo* turned entirely on the notion that exclusion and deportation proceedings did not constitute a "rescission" and hence did not trigger the five-year statute of limitation. *See Belenzo*, 17 I. & N. Dec. at 383 (holding that the "5-year period of § 1256 is, by its own terms, applicable only to rescission"); *id.* ("The BIA also takes the position that the limitation period is applicable because, in substance, the current [deportation] proceeding is one for rescission. I disagree."); *S-*, 9 I. & N. Dec. at 557 (holding that "since section [1256(a)] only limits the Attorney General's authority to *rescind* an adjustment of status, the lapse of more than five years since the applicant's adjustment does not bar an exclusion proceeding") (emphasis in original). That conclusion plainly cannot be applied to removal proceedings in view of IIRIRA's amendment of § 1256(a) to state explicitly that a removal order constitutes a rescission. *Belenzo* and *S-* are therefore inapplicable in the context of removal proceedings, if not overruled by the statute outright.

The second rationale, that deportation and exclusion are "different" from rescission because they result in an order allowing for the alien's physical removal, is similarly unavailing.[15] To say that deportation and exclusion proceedings are different from rescission proceedings is not enough. The question is whether an order of exclusion or deportation entered against a lawful permanent resident (solely on the basis of alleged ineligibility at the time of adjustment) also necessarily constitutes a rescission of lawful permanent resident status within the meaning of the statute, such that the five-year bar applies. *See* discussion, *infra*, Reasons for Granting the Petition ¶ 3c. Again, IIRIRA compels an affirmative answer to this question, at least in the context of removal proceedings.

The third rationale, that the five-year bar exists to compensate for the possibility of lesser procedures in rescission, is specious. Rescission procedures are not and have never been "informal." *See Belenzo*, 17 I. & N. Dec. at 383 n.3 (conceding that procedures are "generally formal"); *Matter of S*, 9 I. & N. Dec. at 555 n.8 (conceding "little difference" between deportation and rescission safeguards). Moreover, the formality of any proceeding that nullifies lawful permanent

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[15] There is no readily imagined reason why the government would seek rescission but not seek a removal order. Once an alien is ordered removed, the government can still forebear removal through an exercise of its enforcement discretion commonly known as "deferred action." *See American-Arab*, 525 U.S. at 483-84. The government may exercise this power "for humanitarian reasons or simply for its own convenience," and its decision whether to do so is not reviewable. *Id.* Hence, there is no reason to go only "half way" with a rescission and no removal order, and the government seldom, if ever, does so. Moreover, the notion that an alien will be returned to a lawful (*e.g.*, non-immigrant) status after rescission is far-fetched. In most if not all situations a non-immigrant visa would not outlast the rescission period, and other adjustees (*i.e.*, through suspension of deportation) who did not have any legal status initially will necessarily be deportable upon rescission of their status as well.

resident status is undergirded by the Constitution, *see Plasencia*, 459 U.S. at 32. This purely theoretical "formality" argument is therefore a thin reed indeed on which to rest such a radical diminution of the statute's effect. And since the argument is advanced in support of the proposition that exclusion and deportation proceedings against lawful permanent residents for improper adjustment do not constitute rescission, the argument is untenable in the context of a post-IIRIRA removal proceeding. Finally, Congress is presumed to know the law when it legislates—whether statutory or regulatory—and presumably was aware in enacting section 308 of IIRIRA that rescission proceedings were and for many decades had been as formal, if not more so, than exclusion, deportation, and removal proceedings.

Finally, the Court of Appeals suggested that applying the five-year limitation to the nullification of permanent resident status through removal would result in disparate treatment as between aliens who adjust status and those who obtain their status through admission at the border. Any disparate treatment, however, is inherent in the rescission statute. Section 1256(a) *by its terms* applies only to adjusted permanent residents, and not to aliens admitted as permanent residents at the border. Hence, to the extent that *any* effect is given to the statute, it must necessarily result in such "disparate treatment." The Fourth Circuit's interpretation is no different: it also results in disparate treatment by providing putative "protection" from the "potentially" less rigorous rescission proceeding only to adjusted permanent residents. "Disparate treatment" is in this respect inescapable. Yet, surely, this feature of the statute cannot license a court to whittle the provision into nullity, or near-nullity.[16]

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[16] There are perfectly rational reasons why Congress might wish to accord finality to adjustments of status rendered in the United States but not to those rendered abroad amid the bustle of consular processing. But in any case, if there is a problem of disparate treatment that rises to

4f. Most critically, *Matter of S-* deprives the five-year limitation of any real effect, as the Attorney General himself candidly acknowledged:

> I recognize that as I construe the time limitation in section [1256] it may be of little practical value to the alien. While the limitation obviously prevents the Attorney General from returning the alien to the category of a nonimmigrant on the basis of conduct which would have justified a rescission of adjustment, it could be argued that this entails no real benefit to the alien since the same conduct nevertheless can be utilized independently as a ground for his deportation or exclusion. This makes it difficult to ascertain precisely why Congress enacted the time limitation.

Matter of S-, 9 I. & N. Dec. at 555. The Attorney General thus admitted that his interpretation robs the provision of substantial effect. Though assured against a proceeding that rescinds his status, the alien remains vulnerable to a proceeding that both rescinds his status and results in an order of removal (on the very same charge that would form the basis of the rescission proceeding if one had been timely brought).

The Department of Justice is of two minds as regards the intent of the five-year limitation. On the one hand, the BIA, construing section 1256(a) according to its straightforward meaning, acknowledged that "[w]e recognize the respondent's argument that the five-year limitation in section [1256(a)] is remedial in nature, as its purpose is to grant an

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constitutional proportions, *but cf. Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977) (requiring only a "facially legitimate, bona fide reason" to survive equal protection attack), the solution is to afford the benefit of the five-year limitation to other similarly-situated aliens in an appropriate case, not to read the provision out of the statute. *See Asencio v. INS*, 37 F.3d 614, 617 (11th Cir. 1994); *De Osorio v. INS*, 10 F.3d 1034, 1037 (4th Cir. 1993); *De Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976).

alien relief from the harsh results of rescission of status." *Carrillo-Gutierrez*, 16 I. & N. Dec. at 430. On the other hand, the Attorney General, reversing the Board and the Immigration Judge, had to acknowledge that its contorted interpretation of the statute "makes it difficult to ascertain precisely why Congress enacted the time limitation." *Matter of S-*, 9 I. & N. Dec. at 555.

The administrative interpretation in *Matter of S-* breaches the most fundamental rule of statutory construction, *i.e.*, to accord real and substantial meaning to all of the terms of a statute. "The cardinal principle of statutory construction is to save and not to destroy." *Labor Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section, as the Government's interpretation requires."); *Sutton v. United States*, 819 F.2d 1289, 1295 n.9 (5th Cir. 1987) ("[A]s a basic principle of statutory construction . . . a statute should not be construed in such a way as to render certain provisions superfluous or insignificant.") (internal quotations omitted). By failing to ascribe any but the most crabbed significance to the five-year limitation language, *Matter of S-* robs the statute of meaningful effect. Similarly, the Circuit Court's interpretation gives no effect to IIRIRA's amendment. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). The obvious reason for a statute of limitation is repose, *see Cannon v. Kroger Co.*, 837 F.2d 660, 666 (4th Cir. 1988), but the Attorney General's interpretation offers none.[17]

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[17] Where, as here, a statutory provision is intended for the protection or benefit of the alien, ambiguities must be construed in the alien's favor. *See, e.g., Scott*, 385 U.S. at 225; *Carrillo-Gutierrez*, 16 I. & N. Dec. at 430.

5. The Court of Appeals erred in finding the Attorney General's interpretation of § 1256(a) reasonable for the same reasons it erred in finding "ambiguity" in the statute as applied to removal orders. The interpretation is squarely inconsistent with the language of the statute, and robs this protective provision of all or nearly all effect.

6. Properly read, § 1256(a) provides that a rescission must be undertaken within five years of adjustment of status and that a removal order for improper adjustment of status is a rescission. Since the removal proceeding rescinding Petitioner's lawful permanent resident status below was brought more than eight years after his adjustment, the rescission was unlawful and should not stand. The Fourth Circuit's erroneous decision eviscerates the important protection of § 1256(a) and creates an unnecessary circuit split. The decision of the Court of Appeals below should be reversed and the matter remanded to the Attorney General with instructions to terminate the removal proceedings and restore Petitioner's lawful permanent resident status.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

No. 03-1352

FELIX ILKECHUKWU ASIKA,
Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,
Respondent.

Argued: Jan. 20, 2004
Decided: March 29, 2004

Before WILKINS, *Chief Judge*, and LUTTIG and TRAXLER, *Circuit Judges*.

Affirmed by published per curiam opinion.

OPINION

PER CURIAM:

The petitioner, Felix Ilkechukwu Asika, was held to be deportable on July 23, 1998, in an order affirmed by the Board of Immigration Appeals ("the Board") on February 26, 2003. He appeals this decision, arguing that the Attorney General was barred from bringing a *deportation* action against him by the five-year statute of limitations on the *rescission* of wrongfully granted adjustments. *See* 8 U.S.C. § 1256(a). Because we conclude that the Immigration and Naturalization Act is ambiguous on this point, we defer to the

interpretation of this provision adopted by the Attorney General. Accordingly, we affirm the Board's judgment.

I.

Felix Asika entered the United States on a nonimmigrant student visa on April 14, 1979, almost twenty-five years ago. On May 27, 1981, at approximately the same time this visa expired, he married Paula Aliniece, an American citizen. That same year, Ms. Aliniece filed a visa petition on his behalf with the Immigration and Naturalization Service (INS), and Asika filed an accompanying application to adjust his status to lawful permanent residence.

The INS had not yet acted on these filings when, six years later, on June 16, 1987, Asika applied for temporary resident status under the 1986 Legalization or Amnesty program. *See* 8 U.S.C. § 1255a. The INS denied this application for lack of supporting documentation on January 21, 1988. And, on February 17, 1988, Asika timely filed an administrative appeal of this denial. Yet, on June 22, 1989, while this administrative appeal was still pending, Asika filed another application with the INS to "adjust" his status of a temporary resident—the status that the INS had recently *denied* to him—to that of a permanent resident. Despite the fact that Asika was not, in fact, a temporary resident at the time he filed this application, the INS granted this adjustment in error and issued a green card to Asika, allowing him to remain permanently in the United States.[1]

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[1] The INS finally considered and rejected Asika's appeal of its denial of *temporary* resident status in May 1993. In the course of considering Asika's appeal, the Eastern Service Center of the INS determined that the agency had improperly granted permanent resident status to Asika in 1989 and recommended that this adjustment be rescinded. J.A. 120, 150. However, the Washington District office of the INS declined to accept this invitation based on its conclusion, once again in error, that Asika had been

After the passage of six more years, on September 21, 1995, Asika applied for naturalization. As the INS processed Asika's application, it determined that it had erroneously granted Asika's 1989 application for an adjustment to permanent residence status. J.A. 150-51. It also discovered that both the 1981 visa petition filed by Paula Aliniece, Asika's now-estranged wife, and Asika's accompanying application for an adjustment of status, filed fifteen years earlier, were "technically still pending." The INS then attempted to contact Ms. Aliniece in two letters (sent to the address that Aliniece supplied in her 1981 visa petition) to request that she provide evidence in support of a bona fide marriage to Asika. When Aliniece did not respond to these letters, the INS denied both her petition and Asika's accompanying application for an adjustment of status. On May 13, 1997, based, in part, on these denials and, in part, on its determination that Asika had attained permanent residence status in error, the INS concluded that Asika had failed to establish that he had been " *lawfully* admitted for permanent residence," *see* 8 U.S.C. § 1427(a) (emphasis added), and denied his application for naturalization.

The INS instituted removal proceedings against Asika, pursuant to 8 U.S.C. § 1229a(a)(1), on August 19, 1997. It asserted that Asika was deportable because, at the time of the erroneous 1989 adjustment, he was "within" two "classes of aliens inadmissible by the law." J.A. 346; 8 U.S.C. § 1227 (a)(1)(A).[2] Asika did not deny that he was within either class

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granted permanent resident status as an immediate relative of a United States citizen. J.A. 122, 124, 150.

[2] In particular, the INS asserted that Asika was inadmissible—and therefore deportable—because he filed for an adjustment of status in 1989(1) for the purpose of performing "skilled or unskilled labor" without a certification from the Secretary of Labor, 8 U.S.C. § 1182(a)(5)(A), and (2) without "a valid, unexpired immigrant visa," 8 U.S.C. § 1181(a). J.A. 324.

of inadmissible aliens at the time of his adjustment; rather, he objected that section 246(a) of the Immigration & Naturalization Act ("the Act"), 8 U.S.C. § 1256(a), which he believed to provide a five-year statute of limitations on the *rescission* of adjustments, also foreclosed the INS from *removing* him based on an erroneous adjustment after five years had passed. In an order entered July 23, 1998, an immigration judge ("IJ") rejected Asika's argument and affirmed the Attorney General's longstanding interpretation that section 246(a)'s temporal limitation on the power to *rescind* does not serve to abridge the distinct power to *deport*. *See* J.A. 200 (relying upon *Matter of Belenzo*, 17 I. & N. Dec. 374, 1980 WL 121894 (Att'y Gen.1981)). The IJ also held that Asika did not possess a valid, unexpired immigrant visa when he applied for an adjustment of status in 1989, and, for that reason, was deportable under 8 U.S.C. § 1227(a)(1). J.A. 200; *see also* 8 U.S.C. § 1181(a). The Board of Immigration Appeals affirmed this order without opinion on February 26, 2003, and Asika now petitions the court for review.

II.

Asika's sole, viable challenge to the Board's affirmance of the order of deportation is that the INS was barred by section 246(a) of the Act from charging him with deportation, eight years after it had adjusted his status to that of a permanent resident.[3] Although, on its own terms, section 246(a) dis-

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[3] Asika also argues that the IJ's order of removal was in error because the IJ relied for his determination that Asika was inadmissible at the time of his adjustment on the fact that Asika lacked a valid entry document. Asika contends that under 8 U.S.C. §§ 1255a(4)(A), (b)(1)(C), and (d)(2), this ground for inadmissibility cannot be relied upon to deny "legalization-related" adjustments. We have no jurisdiction to consider this argument, however, because Asika failed to make it before the Board and, therefore, failed to exhaust "all administrative remedies." *See* 8 U.S.C. § 1252(d); *Gallanosa v. United States*, 785 F.2d 116, 119 (4th

cusses only the rescission of status adjustments and does not purport to limit the Attorney General's power of deportation, Asika argues that its five-year statute of limitations must be applied to deportation proceedings as well, where the INS's only ground for deportation is that the individual's adjustment was improperly granted. Following the Third Circuit, Asika contends that the "practical effect" of reading section 246(a) not to apply to deportation in this set of cases would be to "construe it out of existence." *See Bamidele v. INS*, 99 F.3d 557, 562-65 (3d Cir.1996). He also argues the Attorney General's contrary interpretation is not due deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), both because the statute is clear and because "a statute of limitations is not a matter within the particular expertise of the INS," *see Bamidele*, 99 F.3d at 561.

We disagree. Even accepting that section 246(a) does, in fact, create a five-year statute of limitations on rescission actions, we must defer, under *Chevron*, to the INS's longstanding interpretation of its removal power as being unrestricted by such a statute of limitations, so long as that interpretation is permissible in light of the statutory text and reasonable. We believe that it is and reject Asika's petition.

A.

Section 246(a) provides,

> If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact

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Cir.1986) (holding that the predecessor statute to section 1252(d) is jurisdictional).

> eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such a person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to the commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

8 U.S.C. § 1256(a) (emphasis added).

Both Asika and the Attorney General agree, with uniform support from the case law, that section 246(a) establishes a five-year statute of limitation on the Attorney General's power to rescind erroneously granted adjustments of status. *See, e.g., Morales v. Yeutter*, 952 F.2d 954, 956 (7th Cir.1991); *Fulgencio v. INS*, 573 F.2d 596, 598 (9th Cir.1978); *Quintana v. Holland*, 255 F.2d 161, 164 (3d Cir.1958); *see also Matter of S—*, 9 I. & N. 548, 554, 1857 WL 3663 (A.G.1962). Although the plain language of the statute does not lend itself easily to such a reading,[4] the

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[4] The text of section 246(a) appears to *require* the Attorney General to rescind an adjustment of status if he determines that such an adjustment was erroneous within five years of the agency's decision to grant it. It states, "the Attorney General *shall rescind* the action taken granting an adjustment of status," "if, at any time within five years after" that adjustment, "it shall appear to [his] satisfaction [ ] that the person [who received the adjustment] was not in fact eligible for" it. *See* 8 U.S.C. § 1256(a) (emphasis added). At least on its face, the statutory text does not even address the question of whether the Attorney General has the discretionary power to act to rescind an adjustment *after* the passage of five years.

Were section 246(a) so interpreted, Asika's claim would necessarily fail. If section 246(a) does not create a statute of limitation for even

Attorney General understands section 246(a)'s directive that, "the Attorney General *shall rescind* the action taken granting an adjustment of status," not to compel action by the government, but rather, as a term of art, used to provide him and his designees with the "prosecutorial discretion" to rescind an adjustment of status whenever they see fit within the five-year window provided by the statute. *See Matter of Quan*, 12 I. & N. Dec. 487 (BIA 1967) (providing that "the Service may exercise discretion in determining whether rescission proceedings should be instituted in any individual case"). Having interpreted the statute to permit, but not require, him to act within this five-year window, the Attorney General necessarily treats this time limitation as a statute of limitations to forbid rescission actions after its passing. *See Matter of Belenzo*, 17 I. & N. Dec. 374, 380, 1980 WL 121894 (Att'y Gen.1981).

We need not—and do not—consider today, in the absence of any briefing by the parties, whether the interpretation of section 246(a) adopted by the Attorney General is permissible in the face of the statutory text. We do observe, however, that the Attorney General's permissive interpretation of "shall," on which this interpretation rests, finds parallels in both the immigration and criminal contexts.[5]

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rescission proceedings, there can be no claim that deportation proceedings are so limited by that section.

[5] The INS commonly interprets the term, "shall," in the same permissive manner as the Attorney General has in this case, *see* Memorandum from INS Commissioner Doris Meissner to Regional Directors, et al., *Exercising Prosecutorial Discretion*, at 3 (Nov. 17, 2000) (explaining that, "a statute directing that the INS 'shall' remove removable aliens would not be construed by itself to limit prosecutorial discretion"), a practice that has been sanctioned by courts in both the immigration and criminal context. *See, e.g., Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999); *Costa v. INS*, 233 F.3d 31, 37 (1st Cir.2000); *see also Heckler v. Chaney*, 470 U.S. 821, 835, 105 S.Ct. 1649, 84 L.Ed.2d

B.

Even assuming that section 246(a) establishes a five-year limitation on the Attorney General's power to *rescind* an adjustment, Asika's claim that such a limitation must also extend to the Attorney General's authority to *deport* must still fail.

The Attorney General has held, since 1962, that section 246(a)'s five-year limitation on the rescission of adjustment of status does not apply to deportation proceedings, even when the deportation occurs "on grounds which existed prior to the adjustment and which would also have supported rescission." *See Matter of S—*, 9 I. & N. Dec. 548, 548, 1961 WL 12218 (Att'y Gen.1962). Asika's claim obviously implicates this construction of the Act, which the Attorney General is charged with enforcing. Therefore, we are bound to review the Attorney General's construction under "the principles of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)." *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999).

i.

Our first task under *Chevron* is to determine whether "Congress has [ ] directly addressed the precise question at issue." *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. We agree with the Third Circuit that it has not. *See Bamidele*, 99 F.3d at 561 (holding that "Congress has given us little guidance" on this question); *but see Oloteo v. INS*, 643 F.2d 679, 682-83 (9th Cir.1981) (holding that the intent of Congress was "plainly, unequivocally and unambiguously"

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714 (1985) (interpreting the directive in section 334 of the FDCA that violators "shall be imprisoned . . . or fined," to "commit complete discretion to the Secretary to decide how and when" to prosecute under the Act).

expressed in the Act and that the five-year limitation on the rescission of adjustments *did not* apply to deportation proceedings). The Act does not speak directly to the interplay between the Attorney General's authority to rescind an adjustment of status and his authority to deport, and provides no express guidance whatsoever on the more narrow question of whether the five-year limitation on rescission actions must also apply to deportation actions, in those cases where the same grounds that justify deportation would also support rescission of status. Moreover, to the extent that the language of the Act provides any direction at all, it implicitly supports the Attorney General's position that Congress intended for section 246(a)'s five-year limitation to apply only to the rescission of adjustments. *See id.* Section 246(a) itself gives no indication that its five-year limitation restrains the Attorney General's deportation authority, and the provisions of the Act that govern deportation refer neither to section 246 nor the statute of limitations that it purportedly creates, nor, for that matter, to any time limitation on deportation at all.

In support of his argument that the statute forecloses the position taken by the Attorney General, Asika points to the final sentence of section 246(a), added to the Act as part of a 1996 amendment, which provides,

> Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and *an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.*

8 U.S.C. § 1256(a) (emphasis added). If an order of removal "shall be sufficient to rescind" an adjustment of status, Asika reasons, then the five-year limitation on rescission must also be applied to the Attorney General's authority to deport, or else the Attorney General would be able to rescind an alien's status through the deportation process, notwithstanding the passage of the five-year statute of limitations on

rescission actions. To adopt such a construction, Asika argues, would be, in effect, to "construe [section 246(a)] out of existence." *See Bamidele*, 99 F.3d at 564.

We recognize, as does the Attorney General (at least implicitly),[6] that this inferential argument has some force; however, it is not the *only* way in which the Act may statement in be interpreted to give independent effect to section 246(a). In fact, contrary to Asika's argument—and the Third Circuit's *Bamidele*—section 246(a)'s five-year limitation on rescission actions plays an important, if limited, role, even in the Attorney General's construction of Act. Under the Act, rescission proceedings are subject to few, if any, procedural protections, *see* 8 U.S.C. § 1256; deportation proceedings, in contrast, are subject to extensive procedural regulations set forth in 8 U.S.C. § 1229a. In light of this difference in the two procedures, section 246(a)'s five-year limitation on rescission—even if interpreted to apply only to rescission proceedings—provides an important safeguard to aliens like Asika, who have been in the country for more than five years after their status has been erroneously adjusted, by forcing the Attorney General to establish their deportability through the more rigorous procedures of removal, *see* 8 U.S.C. § 1229a, rather than the less procedurally-onerous process of rescission.[7] *See Matter of S—*, 9 I. & N. at 555 n. 8. Asika is,

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[6] In *Matter of S—*, the Attorney General conceded that his construction "of the time limitation in section 246 may be of little practical value to the alien." *See Matter of S—*, 9 I. & N. at 555.

[7] Asika argues that this statutory difference in procedural protections should not figure in our analysis because, in practice, the INS conducts rescission and deportation proceedings in an almost identical fashion. This argument is meritless. The touchstone of the first step under *Chevron* is congressional intent. *See Chevron*, 467 U.S. at 842- 43, 104 S.Ct. 2778. That the *INS* has chosen *in its discretion* to provide additional procedural protections to aliens in rescission proceedings reveals nothing about whether Congress relied on the *statutory* disparity in procedures for rescission and removal in enacting section 246(a).

therefore, wrong to argue that the Attorney General's construction of the statute is not tenable in light of the statutory scheme.

When the statute does not speak unambiguously to the precise question at issue, our inquiry under *Chevron* is simply to ask whether the Attorney General's position "is based on a permissible construction of the statute." *See Chevron,* 467 U.S. at 863, 104 S.Ct. 2778; *Akindemowo v. INS*, 61 F.3d 282, 284 (4th Cir.1995). Because the Act itself provides little textual guidance as to the interplay between deportation and rescission, and the construction adopted by the Attorney General gives meaning to each of the Act's terms, we hold that it is. *See Chevron*, 467 U.S. at 863 n. 11, 104 S.Ct. 2778.

ii.

Having so concluded, we are bound by *Chevron* to defer to the Attorney General's construction of the Act so long as it is reasonable.[8] We believe it is. First, as the Attorney General

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[8] The Third Circuit agreed that Congress had not spoken clearly to the question at issue in this case, but nevertheless refused to defer to the Attorney General's interpretation of the Act because it believed that the interpretation concerned only a statute of limitations, and "a statute of limitations is not a matter within the particular expertise of the INS." *Bamidele*, 99 F.3d at 561. We disagree. The Attorney General's answer to the question presented in this case—whether section 246(a)'s five-year statute of limitations should also serve to limit the Attorney General's power to deport in those instances where deportation would have the effect of rescinding a previous adjustment of status—does not depend on a straightforward interpretation and application of a statute of limitations; rather, it requires the Attorney General to consider whether a five-year statute of limitations would be consistent with the statutory and regulatory framework for deportation, when applied to a few, but not all, of the cases within that framework. Unlike the Third Circuit, we believe that such a judgment calls upon precisely the sort of agency expertise to which *Chevron* requires the courts to defer. *See Akindemowo*, 61 F.3d at 285 (holding that, "deference to an agency's interpretation is particularly apropos here because the immigration laws 'have produced a complex and

explained in *Matter of S—*, the extension of section 246(a)'s five-year limitation to deportation proceedings would create an apparent anomaly in the Act, limiting to five years the Attorney General's authority to deport those aliens who received lawful permanent residence status through adjustment, but not those who gained such status upon entering the country. *See Matter of S—*, 9 I. & N. at 554. It is not unreasonable for the Attorney General to read the Act to avoid such disparate treatment of aliens, based solely on the means by which they received permanent resident status.

Second, as explained above, the Act requires the Attorney General to provide aliens charged with deportability greater procedural protections than those faced with the rescission of their status adjustment, even though the rescission of an adjustment serves to establish the alien's deportability by returning him to nonimmigrant status. The Attorney General reasoned from this difference in procedural protections that,

> the five-year limitation [on rescission] would thus seem to be recognition that it would be unfair to permit indefinitely such serious consequences to be effected through a somewhat informal process. After five years, the Attorney General is, therefore, required to correct mistakes in granting permanent resident status to those initially admitted as nonimmigrants in the same manner as in the case of other aliens, i.e., through deportation.

Matter of S—, 9 I. & N. at 555 n. 8. As above, we find this explanation to be reasonable. The removal of an alien—even one that is in the United States due to a mistake by the INS—is a serious and disruptive event in that individual's life; the difficulties that such an action cause for the alien are likely to be increasingly severe the longer he has remained in the country. In view of these difficulties, we believe it is entirely

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highly regulatory program' entailing policy determinations that fall within the ambit of agency expertise.'").

reasonable for the Attorney General to interpret the statute to have limited his ability to utilize the less formal rescission process to the five-year period after an alien has received an adjustment, but not to have placed such a limitation on his ability to effect removal proceedings.

III.

The judgment of the Board of Immigration Appeals, affirming the IJ's order of removal is, accordingly, affirmed.

AFFIRMED

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Fails Church, Virginia 22041

File: A90-278-797–BALTIMORE Date: FEB 26 2003
In re: ASIKA, FELIX ILKECHUKWU
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT: MAGGIO, MICHAEL, Esquire
ON BEHALF OF SERVICE: RAGHEB, MONA M.

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See S* C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and section 240A, 245, 248, and 249 of the

Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ Paul W. Schmidt
PAUL W. SCHMIDT
For The Board

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT BALTIMORE, MARYLAND

IN THE MATTER OF — IN REMOVAL PROCEEDINGS

ASIKA, FELIX I. — CASE # A90-278-797

(RESPONDENT)

CHARGES: § 237 (a)(1)(A) of the Immigration and Nationality Act (INA), in that at the time of adjustment of status, he was inadmissible by the law existing at that time because he sought to enter the United States to work without labor certification.

INA § 237(a)(1)(A), in that at the time of adjustment of status, he was inadmissible by the law existing at that time for not being in possession of a valid, unexpired immigrant visa at time of adjustment of status.

APPLICATIONS: Termination of Proceedings, or in the alternative;

INA § 240B: Voluntary Departure

ON BEHALF OF THE RESPONDENT
Blame L. Gilbert
200 East Lexington Street
Lower Level Suite
Baltimore, Maryland 20910

ON BEHALF OF THE INS
Lawrence O. Burman, Esq.
Assistant District Counsel
100 South Charles Street
Baltimore, Maryland 21201

MEMORANDUM OF DECISION AND ORDER

On November 26, 1997, the respondent, through counsel, appeared before this Court and denied allegations four and five in the Notice to Appear (NTA) issued by the Immigration and Naturalization Service (INS), dated October 29, 1997. Allegation number four charged that the respondent's status was erroneously adjusted to that of a lawful permanent resident. And, allegation number five charged that the respondent was not eligible to adjust his status because he was not accorded Temporary Resident Status. The respondent appeared before this Court again on June 11, 1998 to present a motion to terminate the removal proceedings against him or in the alternative, to request voluntary departure under INA § 240B.

I. BACKGROUND

1. Testimonial Evidence

The respondent is a 41 year-old male native and citizen of Nigeria. He entered the United States in 1979 in Houston, Texas as a nonimmigrant student.

The parties stipulated to the following facts. The respondent filed an I-130 petition, together with his wife, in June of 1981. He applied for legalization in June of 1987. The legalization application was denied by the INS in January of 1988. The respondent appealed that denial of legalization in February of 1988. The respondent then applied for adjustment of status in June of 1989 and that adjustment application was granted by the INS in July of 1989. The respondent's legalization appeal was denied in May of 1993 and the respondent's I-130 petition was denied in April of 1997.

The respondent currently resides in Hyattsville, Maryland, where he owns a condominium. The respondent is employed at NationsBank in customer service earning a salary in the range of $20,000-$25,000. He has worked for this employer

for nearly ten years. NationsBank is not interested in petitioning on behalf of the respondent. The respondent further testified that he has no criminal record, has never been on public assistance, and has always paid his taxes.

The respondent also testified that he was married in April of 1981, but separated from his wife two years later. The respondent has not received a final divorce from his wife. He claims that his wife now resides in Toronto, Canada. He also stated that his parents are deceased, that he has three sisters in Nigeria, and one brother in Atlanta, Georgia. The respondent also expressed his concern over the hardship that he would face if ordered removed to Nigeria.

2. Documentary Evidence

The Court admitted the following documents into evidence:

1. Notice to Appear dated October 29, 1997 (Exh. 1);
2. Numerous documents from the INS relating to the immigration history of the respondent (Exh. 2, Tabs A-O[1]);
3. Affidavit and memorandum of law for the respondent (Exh. 3);
4. Several documents submitted by the respondent including the deed to the respondent's condominium and copies of W-2 forms from the respondent's employer (Exh. 4).

At the conclusion of the proceedings, which included the presentment of testimony and evidence, the Court reserved its decision to further review the evidentiary record.

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[1] The INS withdrew tabs F and J of Exhibit 2 from evidence.

II. POSITION OF THE PARTIES

1. The Respondent

First, the respondent claims that the five-year time limit under INA § 246(a) is a statutory bar to any removal that occurs after five years from the date of adjustment of status. Second, therespondent asserts that he is not deportable under INA § 237(a)(1)(A) because he was admissible at time of adjustment of status due to his filing of an I-130 visa petition. Third, the respondent claims that the removal proceedings should be terminated because the respondent has been prejudiced by the INS's long delay in seeking to rescind his lawful permanent resident status.

2. The INS

The INS claims that the adjustment of status granted to the respondent in 1989 was in error. The INS thus asserts that the respondent is deportable as charged in the NTA.

III. FINDINGS OF THE COURT

1. The Five-Year Rescission Bar Under INA § 246(a)

The respondent first claims that the five-year statutory time limit in INA § 246(a), regarding rescission of adjustment of status, bars the removal of the respondent for the charges listed in the NTA. INA § 246(a) states that

> If at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting adjustment of status to such person and . . . the person shall thereupon be subject to all provisions of this chapter to the same extent as if adjustment of status had not been made.

The respondent argues that the five-year time limit on rescission in INA § 246 bars any removal of an alien after five years has passed since the date of adjustment of status. However, the Attorney General explicitly rejected this argument in *Matter of Belenzo*, 17 I. & N. Dec. 374 (Atty. Gen. 1981)[2]. In *Belenzo*, the Attorney General held that the five-year time limit does not bar the subsequent removal of an alien just because the proceedings were brought after five years from the date of adjustment. *See also Oloteo v. INS*, 643 F.2d 679 (9th Cir. 1981); cf. *Bamidele v. INS*, 99 F.3d 557 (3rd Cir. 1996) (rejecting Attorney General's decision in *Belenzo* and holding that the five year time limit in INA § 246(a) is a bar to any deportation after five years has elapsed from the date of adjustment of status).[3]

2. Removability Under INA § 237(a)(l)(A)

The respondent's second argument is that he is not deportable under INA § 237(a)(1)(A). Section § 237(a)(1)(A) of the INA states that "[a]ny alien who at the time of admission or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable." The respondent claims that he was not

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[2] First, the Court strongly disapproves of counsel's incorrect statement and citation of the law, for citing to the BIA's decision in *Matter of Belenzo*. The BIA's decision was explicitly overruled by the Attorney General in that case. Therefore, the BIA's decision in that case is no longer good law. Second, the Court reminds the respondent's counsel of his obligation to credit the proper source when he quotes language from that source. The respondent's counsel directly quoted from the BIA's decision in *Belenzo*, at 379 and did not use quotation marks or properly cite to that decision. Third, the Court also reminds the respondent's counsel of the proper method of citing to BIA decisions: *Matter of Belenzo*, 17 I. & N. Dec. 374 (BIA 1981), not *Matter of Belenzo*, B.I.A. (May 1981).

[3] The Court reminds the respondent's counsel that it sits in the Fourth Circuit. A different result would be required if the Court was sitting in the Third Circuit.

inadmissible at the time of adjustment of status in 1989 because an I-130 visa petition had been filed on his behalf by his wife. However, it is black-letter immigration law that the mere filing of a visa petition does not entitle someone to enter the United States as an immigrant. INA § 211 (provides that " . . . no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa . . . ."). The evidence, as stipulated to by both parties, clearly shows that the respondent was not in possession of a valid, unexpired immigrant visa at the time of adjustment of status. Therefore, the respondent is deportable for being inadmissible at the time of adjustment of status because he did not have a valid, unexpired immigrant visa under INA § 237(a)(1)(A).

3. Estoppel by Laches and Equitable Estoppel

The respondent's last two arguments rely on the equitable doctrines of estoppel by laches and equitable estoppel. Laches is an equitable defense that "may be invoked where the plaintiff has unreasonably and inexcusably delayed in prosecuting its rights and where the delay has resulted in material prejudice to the defendant." *Studiengesellschaft Kohle v. Eastman Kodak Co.*, 616 F.2d 1315, 1325 (5th Cir. 1980) (favorably cited by *Potter Instrument Co. Inc. v. Storage Technology Corp.*, 641 F.2d 190 (4th Cir. 1981)). Thus, to establish the defense of laches, a party must prove that: (1) the delay was unreasonable or inexcusable; and (2) that the party has suffered injury or prejudice as a result. In this case, the respondent claims that the INS's nine-year delay in seeking to rescind his permanent resident status has prejudiced him because he has a long-standing job in the United States and a condominium. However, even assuming that the INS's delay in seeking to rescind the respondent's status was unreasonable, the respondent has not shown how he has been injured by the INS's inaction. If anything, the respondent has benefitted by the inaction of the INS because

he was allowed to live in the United States for nine years longer than he would have without the INS error. *See Heckler v. Community Health Services*, 467 U.S. 51, 62 (1984) (holding that a party suffers no detriment when the government requires it to repay benefits to which it was never entitled to in the first place). Thus, the respondent has failed to establish the elements of the defense of laches.

In regard to the equitable estoppel argument of the respondent, the BIA has recently held that neither it nor the immigration courts have the authority to apply the doctrine of equitable estoppel against the INS. *Matter of Hernandez-Puente*, 20 I. & N. Dec. 335, 338-339 (BIA 1991). Therefore, the equitable estoppel argument of the respondent must be rejected.

Moreover, even if the INS could be estopped, the respondent has failed to show the requisite "affirmative misconduct". The Supreme Court has held that "[a]s a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest." *INS v. Hibi*, 414 U.S. 5 (1973) (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917)). And, "estoppel will not lie against the Government as it lies against private litigants." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 418 (1990); *INS v. Miranda*, 459 U.S. 14 (1982). The Supreme Court, in dicta, has intimated that perhaps "affirmative misconduct" might estop the INS from taking action against an alien. *INS v. Hibi*, supra. Nevertheless, even if this Court had the authority to estop the INS, this Court would be bound by the Supreme Court decision in *Miranda*, supra. In *Miranda*, the Supreme Court held that mere delay by the government was not affirmative misconduct. *Id.* at 18; *see also Matter of Tavabii*, 19 I. & N. Dec. 264 (BIA 1985); *Matter of Onal*, 18 I. & N. Dec. 147 (BIA 1981); *Matter of Chumpitazi*, 16 I. & N. Dec. 629 (BIA 1978). Given that the

respondent is only alleging delay by the INS, this Court would be bound by precedent to reject the estoppel arguments of the respondent even if it had the authority to grant such equitable relief.[4]

4. Voluntary Departure

In order to be eligible for a discretionary grant of voluntary departure under INA § 240B, an alien must demonstrate that he: (1) has been physically present in the United States for at least one year preceding the date of the NTA; (2) has been a person of good moral character for at least five years preceding the application for voluntary departure; and (3) the alien establishes that he has the means to depart from the United States. The respondent has satisfactorily established his eligibility for voluntary departure. The respondent has been physically present in the United States for nearly twenty years and he clearly has the means to depart from the United States, due to his substantial assets, which includes a condominium. Furthermore, the respondent has the requisite good moral character because he has no criminal record, has a

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[4] The Court also notes that, even if equitable estoppel applied to the government like it applied to private litigants, that the respondent has not established the elements of the defense of equitable estoppel. Estoppel is a slightly different defense than laches which "arises only when one has so acted as to mislead another and the one thus misled has relied upon the action of the inducing party to his prejudice." *Studiengesellschaft Kohle*, supra. This defense requires that its proponent prove: (1) misrepresentation by the plaintiff; (2) reasonable reliance on the misrepresentation by the defendant; and (3) a detriment to the defendant as a result of his reliance. *Heckler*, 467 U.S. at 59. In the present case, the respondent has failed to even allege that the INS made a misrepresentation. Also, as explained before, the respondent has not suffered a detriment because he benefitted by the INS's erroneous granting of his adjustment of status and nine-year delay in seeking to rescind that status. *See Heckler*, supra. Thus, even if the INS could be estopped, this Court would not grant the relief because the respondent has failed to establish the elements of the defense of estoppel.

history of working rather than relying on public assistance, has paid his income taxes, and testified honestly before this Court. The respondent's alternative request for relief, voluntary departure, is granted.

IV. CONCLUSION

The respondent's motion to terminate removal proceedings is dismissed and the respondent is deportable under INA § 237(a)(1)(A). However, the respondent's alternate request for relief, voluntary departure, is granted. Accordingly, attached to this decision is an appropriate order.

/s/ Bruce M. Barrett
BRUCE M. BARRETT
United States Immigration Judge

_____
Date

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF	IN REMOVAL PROCEEDINGS
ASIKA, FELIX I.	CASE #A90-278-797
(RESPONDENT)	
CHARGES:	§ 237 (a)(1)(A) of the Immigration and Nationality Act (INA), in that at the time of adjustment of status, he was inadmissible by the law existing at that time because he sought to enter the United States to work without labor certification.
	INA § 237(a)(1)(A), in that at the time of adjustment of status, he was inadmissible by the law existing at that time for not being in possession of a valid, unexpired immigrant visa at time of adjustment of status.
APPLICATIONS:	Termination of Proceedings, or in the alternative;
	INA § 240B: Voluntary Departure

ORDER

It is ordered this 23 day of June, 1998, by the United States Immigration Court, sitting at Baltimore, Maryland,

ORDERED:

1. That the motion to terminate the removal proceedings against the respondent is DENIED,

2. That the application for voluntary departure under INA § 240B is

GRANTED on or before the 24 day of August 1998, and

3. In the alternative, if the respondent violates the voluntary departure order of this Court, he shall be deported from the United States to the country of Nigeria.

June 23, 1998
Date

/s/ Bruce M. Barrett
BRUCE M. BARRETT
United States Immigration
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[May 24, 2004]

No. 03-1352
A90-278-797

FELIX IKECHUKWU ASIKA
Petitioner

v.

JOHN ASHCROFT, ATTORNEY GENERAL
Respondent

On Petition for Rehearing En Banc

The petitioner's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for *Chief Judge* WILKINS, *Judge* LUTTIG, and *Judge* TRAXLER.

For the Court,

/s/ Patricia S. Connor
PATRICIA S. CONNOR
Clerk

APPENDIX E

Additional relevant portion of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*

8 U.S.C. § 1255a(a)(2)(B) (1988):

In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.